

Upon initial review of the draft *Statewide Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development* (Guidelines) Clipper Windpower Development Company (Clipper) would like to contribute the following to the open dialog and collaborative process attempting to address voluntary guidance for siting of wind energy capacity while remaining sensitive to areas of high biological significance concerning avian and bat species.

1) The Guidelines as currently drafted is considerably soft in language that would otherwise clarify its intent. The voluntary nature of the Guidelines should be explicitly noted and qualified in the Abstract as well as in the structure and presentation of the Guidelines content. As written, the Guidelines will likely be misconstrued over time as a basis for setting policy and a regulatory framework by which to conditionally permit a wind energy project. Examples of similar circumstances are noted with regards to the United States Fish and Wildlife Service's (USFWS) *Voluntary Interim Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines* in 10 Jul 03 and the subsequent need to issue a 26 Apr 04 clarification (*Instruction for Implementation*) in order to reiterate the "voluntary and flexible nature of the guidelines". Other examples are seen with the Environmental Protection Agency's (EPA) being reprimanded by the judicial branch for issuances of White Papers as guidance documents but with the result of setting policy without a formal rule making process having been undertaken. The intent of the guidance document is to create a resource wherein industry, government, and special interest groups can reference agreed upon siting criteria. Terms such as "standard" and "method" have a very strict definition within the context of environmental law and imply a more rigid meaning than may be intended in the draft Guidelines.

2) Chapter 4 of the Guidelines attempts to qualify the role of the Guidelines with respect to "relevant wildlife laws that apply to the wind development permitting process". However, the chapter goes on to state that rather than use the Guidelines to determine the significance of the impacts it is "to provide information and guidance that can be useful in evaluating and determining the level of impacts". California has established the CEQA process to address impact significance. As noted by CalWEA, the Guidelines document, as currently drafted, is inconsistent with the CEQA process and reaches beyond the Guidelines' stated intention of "providing information...that can be useful" in determining significance. Such inconsistency is noted in at least these ways: (1) the Guidelines require a "standard" course of study regardless of what is known already about whether estimated impacts will be "significant" under CEQA (defined as biologically significant to the species as a whole). If a scientifically credible case can be made based on existing studies and site surveys that impacts will be well below significant levels, CEQA would not require further study. (2) The guidelines infringe on the authority of the CEQA lead agency by prescribing what applicants can do with "the approval" of California Department of Fish and Game (CDFG) (e.g., whether less than one year of pre-permitting surveys will suffice); under CEQA, CDFG has a commenting and consultative role in this process only. (3) The guidelines' Scientific Advisory Committee (SAC), as further discussed below, is not clearly defined in the context of CEQA, thereby further violating the regulatory process of project approval with regards to environmental review. Furthermore, it is unclear how the SAC would weigh other considerations when deliberating a project's potential impact (e.g., CEQA's Statement of Overriding Considerations mechanism that, despite a project's impact on birds or bats, is used to approve a project due to the more compelling benefits of its development).

3) Similarly, the Guidelines is less a reference source and more a series of single methods (identified as "standards") that are to be used at a given point in the development process (e.g., pre- or post-construction). A true reference document synthesizes information into options such that they can be compared or hybridized to fit the needs of a proposed site for renewable energy development. As currently written, the recommended "standard" is based on virtually a worst-case scenario of project siting and further complicates the development of adequate and accurate datasets by using uncertain language such as "...other study methods may be needed to determine..." and "...additional studies may be needed to help understand...". Industry, by virtue of basic economic principles, needs to function within an environment of certainty. The

DOCKET	
06-OII-1	
DATE	<u>JAN 16 2007</u>
RECD.	<u>JAN 16 2007</u>

Guidance, as currently drafted, introduces uncertainty of risk and cost and yet does not provide industry with certainty that the result, however attained, will result in definitive regulatory action.

4) Finally, again on the point of certainty, the Guidelines, as currently drafted recommend the use of a SAC whose role is not sufficiently defined. The notion of the SAC and the description of its role in the permitting process draws many questions (which will be further addressed in CalWEA's comments) as to the intent and scope of the SAC's involvement in the permitting process. There is no discussion of who will bear the cost of the SAC or a defined context that a voluntary committee's recommendations are to be framed within (i.e., once a SAC issues recommendations there is nothing in the Guidelines that qualify the recommendations as voluntary and therefore at risk to become, for example, regulatory requirements or permit conditions). If regulatory agencies will be represented on the SAC, then how do their recommendations correlate with official agency decisions? Again, industry needs to work within the framework of certainty. The SAC's role is simply unclear and its influence on the regulatory process, without a clear check and balance in place, results in further uncertainty.

In conclusion, Clipper supports the notion of voluntary state guidelines, but strongly opposes the Guidelines as currently drafted. Further refinement of the Guidelines will be suggested in CalWEA's comments and as follows:

- 1) Craft language and content with sensitivity to the general use of key words and phrases within rules and regulations; to do so will eliminate unintended consequences and the need for later qualifications and clarifications;
- 2) Broaden and focus in on the various protocols and techniques that are developed and being developed for assessing bird and bat site characterizations. Given the large number of renewable wind energy development in the United States and the low average bird or bat killed per turbine per year (~2-3 birds/turbine/year and ~3-4 bats/turbine/year), it is clear that more often than not a site will not require the stringent and open ended uncertainties that define the Guidelines' "standards".
- 3) The intent of the SAC seems well-intentioned, but the way in which the Guidelines, as currently drafted, describes the SAC's role introduces uncertainty of both direct costs and risk. The nature of economic competition is that mutual costs are relatively understood; without this "level playing field" there will be hesitancy for market entries. California has set ambitious goals of renewable energy development (20% by 2010). Industry is the only means of accomplishing this goal, but would have difficulty doing so with the uncertainty that would be created by the draft Guidelines.

Questions regarding these comments can be directed to me at the following contact information:

Stu S. Webster
Manager, Permitting
Clipper Windpower Development Co.
6305 Carpinteria Ave., Suite 300
Carpinteria, CA 93013
(805) 576-1785
| swebster@clipperwind.com